U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11913058

Date: OCT. 16, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a nurse supervisor under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition, concluding that the record did not include the required initial evidence to establish eligibility for the benefit sought, including a labor certification and supporting documents, evidence of the Petitioner's ability to pay the proffered wage, and evidence that the Beneficiary possesses an advanced degree or equivalent.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

This petition is for a Schedule A occupation as codified at 20 C.F.R. § 656.5(a). Schedule A occupations are those for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and file an individual labor certification with DOL for individual certification prior to filing the I-140 petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

II. ANALYSIS

The Petitioner filed the petition electronically on April 29, 2014.[1] The Director later issued a Notice of Intent to Deny (NOID) the petition, informing the Petitioner that no evidence had been submitted

[1] The Form I-140 Confirmation Receipt instructed the Petitioner to mail supporting documentation to the Texas Service Center ("Attn: E-Filed I-140").

in support of the petition. Specifically, the Director identified the following required initial evidence that had not been provided:

- An application for Schedule A designation (a completed ETA 9089, Application for Permanent Employment Certification) as required by 8 C.F.R. § 204.5(k)(4)(i).
- Evidence that a notice of filing the labor certification was posted pursuant to 20 C.F.R. § 656.10(d).
- A prevailing wage determination as required by 20 C.F.R. § 656.15(a).
- Evidence of the Petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).
- Evidence that the Beneficiary is a professional holding an advanced degree as required by 8 C.F.R. § 204.5(k)(3)(i).

The Petitioner responded to the NOID and submitted letters from the Beneficiary's former employers and its 2016 Form 1120, U.S. Corporate Income Tax Return. A cover letter from the Petitioner's counsel states that the notice of filing and the prevailing wage determination were "submitted earlier with the petition." The Petitioner did not submit a completed ETA 9089, copies of the notice of filing or prevailing wage determination it claims were submitted earlier, evidence that the Beneficiary possesses an advanced degree or equivalent, or evidence of its ability to pay the proffered wage in any year other than 2016.[2] The Petitioner did not address the lack of a completed ETA 9089 or suggest that it was submitted earlier.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. *See* 8 C.F.R. § 103.2(b)(8)(ii). Therefore, the Director denied the petition, as the record did not include evidence required by the regulations to establish eligibility for the benefit sought.

On appeal, the Petitioner submits a notice of filing, a prevailing wage determination, and the Petitioner's tax returns for 2014 through 2017. The Petitioner has not submitted a completed ETA 9089, evidence of its ability to pay the proffered wage for 2018 onward, or evidence that the Beneficiary possesses an advanced degree or equivalent.

The instructions for filing a labor certification for a Schedule A occupation are found at 20 C.F.R. § 656.15. While Schedule A occupations do not require a test of the labor market or a filing with the DOL, when a petitioner files an application for labor certification for Schedule A designation, the employer must file a completed ETA 9089 and supporting documentation with the appropriate office of the U.S. Department of Homeland Security. *See* 20 C.F.R. § 656.15(a), (b)(1).

On appeal, the Petitioner erroneously states that the denial was based on the finding that it had not shown that the offered job of nurse supervisor qualifies for Schedule A designation. The Petitioner does not explain how it is exempt from the requirement at 20 C.F.R. § 656.15(b)(1) to submit a properly completed and signed ETA 9089. Without a valid labor certification, we are unable to determine the details of the offered position, including the job duties, the minimum education and/or

[2] Counsel's cover letter also indicates that the Petitioner's 2014, 2015, 2017 and 2018 tax returns were attached, however these documents were not included with the NOID response.

experience required for the position, whether there are any special requirements for the offered position, the proposed work location, and any information about the Beneficiary.[3]

Without documentation of the Beneficiary's education, nothing would establish that she met the qualifications of an advanced degree professional. Without a labor certification, we additionally cannot determine whether she would meet any of the position's requirements related to education, training, special skills, and/or experience. The Petitioner was put on notice of these deficiencies in the Director's NOID but did not submit the required evidence in response. Additionally, as noted above, the Petitioner also did not submit a number of the required items on appeal.

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Because the record does not include the initial required evidence, we will dismiss the appeal.[4]

It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

[3] Although the Petitioner submitted the prevailing wage determination and posting notice on appeal, we note that the posting notice does not list the minimum requirements for the nurse supervisor position, which would be listed in the required ETA Form 9089 that the Petitioner did not submit. Additionally, the position duties described on the posting notice do not match the job duties on the prevailing wage determination.

[4] Under former 8 C.F.R. § 103.1(f)(3)(iii)(B), we lack appellate jurisdiction "when the denial of the petition is based upon lack of a certification by the Secretary of Labor." *See* Department of Homeland Security (DHS) Delegation No. 0150.1 II.U (effective March. 1, 2003), https://www.hsdl.org/?view&did=234775 (last visited Sep. 24, 2020) (delegating appellate jurisdiction to us over the matters stated in the former regulation). As noted above, because the DOL has already determined that, for Schedule A occupations, there are not sufficient U.S. workers who are able, willing, qualified and available, the ETA 9089 for a Schedule A petition is considered to be certified in advance by the Secretary of Labor pursuant to 20 C.F.R. § 656.5(a). Although we dismiss the appeal because the Petitioner has not submitted required initial evidence, including a valid labor certification, we may reject an appeal where we do not have jurisdiction.